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SUPREME COURT, U.S.

NO. 79-6626

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

JAMES A. WILLIAMS

Appellant

V.

State of Mississippi

Appellee

Appeal From the United States Court
of Appeals for the Fifth Circuit

Jurisdictional Statement

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JAMES A. WILLIAMS

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APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

Jurisdictional Statement

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 608 F2d 1021, appears at Appendix A, infra, pp. A1-A3. There was no opinion in the United States District Court for the Southern District of Mississippi.

JURISDICTION

Appellant seeks review of the judgment of the United States Appeals Court affirming the District Court's remand of four state indictments for drug-related offenses to the state court. Removal was sought under 28 U. S. C. A., Section 1443(1) (Cum. Supp. 1979). Judgment affirming the remand was entered on December 26, 1979 and the Appeals Court denied rehearing by order entered

February 14, 1980. This Court has jurisdiction to hear and determine this appeal under 28 U. S. C. A., Section 1447(d) (Cum. Supp. 1979). Cases believed to sustain jurisdiction are: Georgia v. Rachel, 384 U.S. 780, 16 L. Ed. 2d 925, 86 S. Ct. 1783(1966); City of Greenwood v. Peacock, 384 U.S. 808, 16 L. Ed.2d 944, 86 S. Ct. 1800(1966); Johnson v. Mississippi, 421 U.S. 213, 44 L. Ed. 2d 121, 95 S. Ct. 159(1975).

QUESTION ON APPEAL

When the federal constitutional right allegedly denied in the state court is racial discrimination by the state court judge in the selection of the grand jury foreperson is the removal test of predictability of state court non-enforcement of the constitutional right to a non-racially selected grand jury foreperson sufficiently satisfied when the complaining citizen shows that, despite an affirmative statement in state law that race shall not be a factor in jury selection, the state supreme court has stated that if there is random character in the selection of the jury as a whole then the selection of the foreperson should be left to the"authority, judgment and discretion on the part of the trial judge..."? Herring v. State, 374 So.2d 784,788(Miss. 1979).

STATEMENT OF THE CASE

Appellant was indicted by two Mississippi grand juries for various drug-related offenses. Appellant sought removal of the indictments to the United States District Court for the Southern District of Mississippi alleging under 28 U. S. C. A., Section 1443(1) that he could not enforce his right in the state courts to be indicted, if at all, by a grand jury free from racial discrimination in the selection of the foreperson thereof. Appellant offered to show no black person had ever been appointed by any state court judge as foreperson of any grand jury for some twenty-eight years. No evidentiary hearing was held in the District

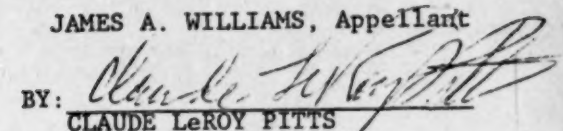
Court and upon motion of the State of Mississippi, the District Judges remanded the indictments to the respective state courts. The United States Court of Appeals for the Fifth Circuit decided Appellant's appeal against him citing that the test of predictability of non-enforcement by the state courts of Appellant's right to non-racially selected grand jury forepersons was not met. This statement is made for the two appeals decided by the Appeals Court.

REASON FOR PLENARY CONSIDERATION

Recently, in Rose v. Mitchell, _____U.S.____, 99 S. Ct. 3009, 61 L. Ed. 2d 739(1979), in refusing to deny habeas corpus attack for racial discrimination in the selection of the grand jury foreperson, this Court acknowledged the difficulty of calling upon a state court judge to condemn himself as having practiced racial discrimination and stated that the purity of the grand jury was so precious that even though a state court conviction might be otherwise valid it should still be set aside through a habeas proceeding if racial discrimination could be shown in grand jury foreperson selection. Recently, the Supreme Court of Mississippi in Herring v. State, supra, practically repudiated the principle of a prima facie case of racial discrimination being shown in the selection of a grand jury foreperson by establishing that the selection system itself provided an opportunity for discrimination and that no blacks had served in that position over an allegedly statistically relevant period of time. This case shall probably stand in the way of any Mississippi trial court action to quash any indictments for the reasons set forth in Rose v. Mitchell , supra. Removal in this limited area by a narrowly drawn decision would probably soon correct the problem in the State of Mississippi.

RESPECTFULLY SUBMITTED,

JAMES A. WILLIAMS, Appellant

BY: 

CLAUDE LeROY PITTS
Counsel for Appellant.

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APPENDIX A
(Opinions)

James A. WILLIAMS,
Plaintiff-Appellant,

v.

STATE OF MISSISSIPPI,
Defendants-Appellees.

Nos. 79-2070 and 79-2363
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Dec. 26, 1979.

Following removal from Mississippi state courts of prosecutions for various drug-related offenses, the United States District Court for the Southern District of Mississippi, Dan M. Russell and Walter L. Nixon, Jr., JJ., granted motions to remand, and defendant appealed. The Court of Appeals held that there was no basis for prediction that defendant could not enforce in state court his federal rights to grand jury selected without regard to race, and thus cases were correctly remanded.

Affirmed.

1. Removal of Cases ⇐70

To warrant removal of case to federal court under statute authorizing removal of civil action or prosecution against any person who is denied or cannot enforce in state courts a right under law providing for equal civil rights, it must appear that right allegedly denied arises under federal law providing for specific civil rights stated in terms of racial equality and that petitioner is denied or cannot enforce specified federal rights in state courts. 28 U.S.C.A. § 1443(1).

2. Grand Jury ⇐2½

Right to have grand jury selected without regard to race can be invoked by statute guaranteeing equal civil rights and stated in terms of racial equality. 42 U.S.C.A. § 1981.

3. Grand Jury ⇐2½
Jury ⇐33(1)

Under Mississippi law, no one shall be excluded from jury service because of race. Code Miss.1972, § 13-5-2.

4. Removal of Cases ⇐70

Although it would have been sufficient if defendant could have pointed to equivalent basis for prediction that he could not enforce his federal rights in state court, no such basis for prediction existed on part of defendant who sought to remove prosecutions of drug-related offenses from Mississippi state courts to federal court on basis of allegation that grand juries were illegally constituted in that blacks were not considered for appointment as forepersons. 28 U.S.C.A. § 1443(1); 42 U.S.C.A. § 1981; Code Miss.1972, § 13-5-2.

Appeals from the United States District Court for the Southern District of Mississippi.

Before BROWN, TJOFLAT and FRANK M. JOHNSON, Jr., Circuit Judges.

* Fed.R.App.P. 34(a); 5th Cir.R. 18.

Synopsis, Syllabi and Key Number Classification
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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

PER CURIAM:

Appellant, James A. Williams, was indicted by two Mississippi grand juries for various drug-related offenses. The grand jury of Lauderdale County returned two indictments against appellant for possession of marijuana with intent to deliver. The grand jury of Kemper County also returned two indictments against appellant, one for unlawful possession of methaqualone, the other for unlawful possession of more than one kilogram of marijuana. Pursuant to 28 U.S.C.A. § 1443(1),[1] appellant filed four petitions for removal of the indictments to the United States District Court for the Southern District of Mississippi. The petitions alleged that the grand juries were illegally constituted in that blacks had not been considered for appointment as forepersons. The State of Mississippi responded by filing four motions to remand the cases to the appropriate state courts. The District Court granted each of the State's motions to remand. We affirm.

[1] Within the last fifteen years, the Supreme Court has construed 28 U.S.C.A. § 1443(1) on three occasions. *Johnson v. Mississippi*, 1975, 421 U.S. 213, 95 S.Ct. 1591, 44 L.Ed.2d 121; *City of Greenwood v. Peacock*, 1966, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944; *Georgia v. Rachel*, 1966, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925. These three cases make clear that a removal petition under 28 U.S.C.A. § 1443(1) must satisfy a two-pronged test:

> First, it must appear that the right allegedly denied the removal petitioner arises under a federal law "providing for specific civil rights stated in terms of racial equality." . . . Second, it must appear, in accordance with the provisions of § 1443(1), that the removal petitioner is "denied or cannot enforce" the specific federal rights "in the courts of [the] State." This provision normally requires that the "denial be manifest in a formal expression of state law," . . . such as a state legislative or constitutional provision, "'rather than a denial first made manifest at the trial of the case.'" . . . Except in the unusual case where "an equivalent basis could be shown for an equally firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights in the state court," . . . it was to be expected that the protection of federal constitutional or statutory rights could be effected in the pending state proceedings, civil or criminal.

Johnson, supra, 421 U.S. at 219-220, 95 S.Ct. at 1595, quoting *Rachel, supra*, 384 U.S. at 799, 803, and 804, 86 S.Ct. 1783. Failure to satisfy either prong of the test is of course fatal.

[2] We assume without deciding that appellant satisfies the first prong. The right to have a grand jury selected without regard to race can be invoked by 42 U.S.C.A. § 1981, a law guaranteeing equal civil rights and stated in terms of

1. 28 U.S.C.A. § 1443(1) provides:

> "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> "(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof . . . ."

racial equality.[2] *See Rachel, supra*, 384 U.S. at 798, 86 S.Ct. 1783. *Cf.* Jury Selection and Service Act of 1968, 28 U.S.C.A. §§ 1861 *et seq.* (declaring and implementing policy that litigants in federal court are entitled to grand and petit juries selected at random from a fair cross section of the community in the district wherein the court convenes). And we can assume that the right to a grand jury selected without regard to race applies fully when only the selection of the foreperson is at issue rather than the selection of the entire grand jury venire. *Rose v. Mitchel*, 1979, ---- U.S. ----, ---- n.4, 99 S.Ct. 2993, 2998 n.4, 61 L.Ed.2d 739, 747 n.4.

[3, 4] Appellant does not satisfy the second prong, however, and this is fatal to removability. As appellant himself recognizes, Mississippi law clearly provides that no one shall be excluded from jury service because of race. Miss.Code Ann. § 13-5-2. Of course, as *Johnson*, *Rachel*, and *Peacock* make clear, it is sufficient if a defendant can point to an equivalent basis for prediction that he cannot enforce his federal rights in state court. Here, however, no such basis for prediction exists. On the contrary, this Court has recognized that the Mississippi courts will protect the right to a grand jury selected without regard to race. *Bass v. Mississippi*, 5 Cir., 1967, 381 F.2d 692, 695. *Cf. Georgia v. Birdsong*, 5 Cir., 1970, 428 F.2d 1223, 1225-26 (predicting the Georgia courts will protect right to non-discrimination in selection of grand and petit juries). Consequently, the District Court was correct in remanding appellant's cases to the appropriate state courts.

AFFIRMED.

2. 42 U.S.C.A. § 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19

Nos. 79-2070
79-2363
Summary Calendar

D. C. Docket Nos. E78-0153(N); CA E78-0154-R, E-79-0024-N and E79-0025-N

JAMES WILLIAMS,

Plaintiff-Appellant,

versus

STATE OF MISSISSIPPI,

Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Mississippi

Before BROWN, TJOFLAT and FRANK M. JOHNSON, Jr., Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that the plaintiff-appellant pay to the defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

December 26, 1979

ISSUED AS MANDATE: FEB 22 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-2070

JAMES WILLIAMS,

Plaintiff-Appellant,

versus

STATE OF MISSISSIPPI,

Defendant-Appellee.

* * * * * * * * *

NO. 79-2363

JAMES WILLIAMS,

Plaintiff-Appellant,

versus

STATE OF MISSISSIPPI,

Defendant-Appellee.

Appeals from the United States District Court for the
Southern District of Mississippi

ON PETITION FOR REHEARING

(February 14, 1980)

Before BROWN, TJOFLAT and FRANK M. JOHNSON, JR., Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

ENTERED FOR THE COURT:

United States Circuit Judge

Feb 12.

U. S. COURT OF APPEALS
FILED
MAR 12 1980
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-2070

JAMES WILLIAMS — PLAINTIFF-APPELLANT

versus

STATE OF MISSISSIPPI — DEFENDANT-APPELLEE

* * * * * * * * *

NO. 79-2363

JAMES WILLIAMS — PLAINTIFF-APPELLANT

versus

STATE OF MISSISSIPPI — DEFENDANT-APPELLEE

NOTICE OF APPEAL

Notice is hereby given that JAMES A. WILLIAMS, Plaintiff-Appellant hereby appeals to the United States Supreme Court the judgment of this Court entered in the above captioned cause on February 14, 1980. This appeal is authorized by Title 28, United States Code, Section 1447.

RESPECTFULLY SUBMITTED,

JAMES A. WILLIAMS,
Plaintiff-Appellant

BY: _____
CLAUDE LeROY PITTS
Counsel for Plaintiff-Appellant

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By _____ Deputy
New Orleans, Louisiana MAR 12 1980

CERTIFICATE OF SERVICE

I, the undersigned Claude LeRoy Pitts, counsel for Plaintiff-Appellant, do hereby certify in accordance with Rule 33 of the Rules of the United States Supreme Court, that I have this date served the above and foregoing NOTICE OF APPEAL upon the Honorable Bill Allain, Attorney General for the State of Mississippi, counsel for Defendant-Appellee by depositing the same in the United States Postal Service, with first class postage prepaid, addressed to Honorable Ed Davis Noble, Jr., Assistant Attorney General, at his post office address, being P. O. Box 220, Jackson, Mississippi 39205. All parties required to be served have been served.

DONE this 11th day of March, 1980.

CLAUDE LeROY PITTS